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Private Autonomy and Protection of the Weaker Party in Financial Consumer Contracts: an EU and International Law Perspective

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Abstract

The global financial crisis has demonstrated how vulnerable financial consumers can be, in particular those who hold a credit or mortgage contract. Although a decade has passed the EU legislation seems limited in providing effective protection as financial markets still experience large mis-selling cases and growing individual debt. This article examines the multi-faceted consumer credit approach adopted by the EU regulator, and the concurrent role played by recent case law in reshaping consumer protection. The conclusion of this article is that, if financial consumer law is to be both effective and growth-promoting, a careful balance is required between the principles of private autonomy and the protection of the weaker party. This article will provide suggestions as to how this can be achieved, proposing a new perspective on financial consumer protection that is influenced by recent international guidelines, fundamental rights developments and behavioural economics.

1. Introduction

The last decades have witnessed a rapid expansion of financial services in Europe, with credit becoming more easily available to consumers. The increasing number of financial products has provided consumers with wider choice, but has also made it more difficult to assess the risks involved in complex credit services. This has contributed to a rise in over-indebtedness, putting consumers in a vulnerable position.[1] For example, during and after the financial crisis several EU Member States, including Bulgaria, Denmark, Spain and the United Kingdom, saw a

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[1] See I. Domurath, G. Comparato and H. Micklitz, "The over-indebtedness of European consumers – A view from six countries", (2014) EUI Working Paper, Law 2014/10; I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015) 159; see also I. Benöhr, *Consumer Protection and Human Rights* (Oxford: OUP, 2013), 111 et seq.

marked increase in foreclosure proceedings with negative consequences on the welfare of many citizens who faced the risk of losing their homes.[2]

While foreclosure procedures may be the inevitable consequence of risk-taking, providers of financial services have an interest in pushing consumers to buy products and take risks, sometimes contrary to the interests of those consumers. Moreover, credit contracts lend themselves to the introduction of unfair clauses which impose future obligations that may be easily overlooked by the consumer. In the face of this development, a robust financial regulatory framework and adequate remedies are essential to protect consumers from unfair terms in credit contracts.[3]

Following the outbreak of the financial crisis, and in order to ensure stronger consumer protection, new principles and guidelines have been developed at the international level. For example, the G20 High Level Principles on Financial Consumer Protection[4] and the UN Guidelines for consumer protection emphasise the need for effective safeguards for financial consumers.[5] While offering an important source of inspiration, these international initiatives are only soft law measures which lack binding force.[6]

At the EU level, the institutional and regulatory financial systems have undergone major reforms since the crisis.[7] In 2011, three supervisory authorities have been established to strengthen financial supervision and create a more stable market: the European Banking Authority, the European Securities and Market Authorities, and the European Insurance and Occupational Pensions Authority. This was followed by the adoption of new legislative

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[2] See *European Commission's Staff Working Paper, National measures and practices to avoid foreclosure procedures for residential mortgage loans, Accompanying document to the Proposal for a Directive on credit agreements relating to residential property, Brussels, 31.3.2011, SEC(2011) 357 final, pp.14-15; see also* Di Nero, "The uncertain development of the case law on consumer protection in mortgage *enforcement proceedings: Sanchez Morcillo and Kušionová" (2015) Common Market Law Review 52, at 1009.*

[3] See O. Cherednychenko, "Fundamental Rights, European Private Law, and Financial Services" in H. Micklitz (Ed.), *Constitutionalization of European Private Law* (Oxford: OUP, 2014), 194-195.

[4] These principles were adopted in 2011: https://www.oecd.org/daf/fin/financial-markets/48892010.pdf (last visited: 20 Sept. 2017).

[5] These guidelines were adopted by the UN General Assembly in April 1985 and recently revised in December 2015: www.unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx (last visited 9 Jan. 2017).

6 For a critical assessment of the G20 model of reform and its non-binding nature see T. Williams, Who Wants to Watch - A Comment on the New International Paradigm of Financial Consumer Market Regulation, 36 Seattle U. L. Rev. 1217 (2013).

7 www.ec.europa.eu/finance/general-policy/policy/map-reform/index_en.htm (last visited: 9 Jan. 2017); see also N. Moloney, "Financial market governance and consumer protection in the EU" in A. Faia, A. Hackentahl, M. Haliassos and K. Langenbucher (eds), *Financial Regulation: A Transatlantic Perspective* (Cambridge: CUP, 2015), 221 et seq.

measures, such as the Mortgage Credit Directive and the Deposit Guarantee Schemes Directive, both adopted in 2014[8] and aimed at improving consumer protection by means of a more effective regulatory framework.[9]

Notwithstanding these changes, mis-selling of credit products[10] and over-indebtedness still represent major challenges in the European market. At the same time surveys show that, among all products, financial services are those that produce most dissatisfaction and mistrust in consumers.[11] This suggests that the inability of the financial sector to carry out its basic societal role is also due to deficiencies in the regulatory framework.[12]

To highlight these shortcomings, and suggest possible directions for improvement, this article will explore the broad EU legal framework, starting with an analysis of how two principles are shaping contract law and consumer protection: the principle of private autonomy and that of the protection of the weaker party. The next section will then examine two key EU Directives: the 2008 Consumer Credit Directive and the 2014 Mortgage Credit Directive. While innovative in some aspects, these measures will be shown to be limited by their traditional approach, based on the information technique and favouring the private autonomy principle.[13] The following section will analyse financial consumer protection in light of the recent Court of Justice of the European Union (CJEU) case law. Four emblematic cases will be assessed in detail, demonstrating the practical relevance of the theoretical discussion. Using these cases, the article will show how the CJEU is playing a central role in reshaping consumer law in Europe, placing at the centre of the discourse the notion of the consumer as the weaker party, and referring increasingly to fundamental rights. This article concludes by arguing that a careful balance is required between the principles of private autonomy and protection of the weaker

8 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

9 Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

10 See, e.g. O. Cherednychenko, J.-M. Meinderstma, *Consumer Credit, Mis-selling of Financial Products,* European Parliament Study, Directorate-General for Internal Policies PE 618.997 - June 2018

11 European Commission, Green Paper on Retail Financial Services Better Products, More Choice, and Greater Opportunities for Consumer and Businesses, COM (2015) 630 final p. 9; European Commission, Consumer Markets Scoreboard: Making Markets Work for Consumers, 2016, p. 18.

12 I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015), 159 et seq.

13 See more in C. Garcia Porras and W. van Boom, "Information disclosure in the EU Consumer Credit Directive: opportunities and limitations" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 21-55.

party, proposing important elements to strengthen financial consumer protection, inspired by behavioural economics and international best practices.

2. The context: financial services, vulnerable consumers and debt

Since the late 1970s, the neo-liberal paradigm has deeply influenced European financial law and policy, with two consequences: first, the welfare state has shrunk, as public services in key areas such as pensions have been privatized.[14] Second, deregulation has facilitated the expansion of credit, which became more readily available and was seen as providing a more efficient resource allocation than public welfare.[15] At the same time, the income of lower- and middle-income consumers has decelerated,[16] so that a growing share of the population has become increasingly reliant, and ultimately dependent, on credit.[17] This process has been described either as the democratisation of credit or the emergence of a debt dominated economy, hinting at the fact that this process has positive sides, but also potentially disquieting aspects.[18]

The European Commission regarded credit as a driver of economic life and a means to address social policy challenges.[19] It could be applied as an instrument to tackle exclusion and poverty, while helping individuals to deal with income drops or short term financial struggles.[20]

However, the financial crisis has exposed the risks of credit, and therefore the downside of an economy based on privately provided, and lightly regulated, financial services. Irresponsible lending practices, and numerous mis-selling cases, have shown the difficulty of enforcing

[14] See e.g. E. Gerba & W. Schelkle, *The Finance-Welfare State Nexus,* ACES cases, 2013, The American Consortium on EU Studies (ACES), Washington, USA; H.M. Schwartz, Housing, the Welfare State and the Global Financial Crises: What is the Connection, *Politics & Society* 40 (1): 35-58.
[15] I. Ramsey, Between Neo-Liberalism and Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU, Journal of Consumer Policy,
[e] J. Ostry, A. Berg and C. Tsangarides, Redistribution, Inequality and Growth (IMF Staff Discussion Note, 2014). I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015), 178-179.

[17] See e.g. I. Domurath, Mortgage, Debt and the Social Function of Contract (2016) *e*, Vol. 22, No. 6, p. 759.
[18] I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015), 178-179.

[19] EU Proposal for a Directive on the harmonisation of the laws, regulation and administrative provisions of the Member States concerning credit for consumers, Brussels 2002, COM(2002) 443 FINAL 2002/0222 (COD).
[20] I. Ramsey, Regulation of Consumer Credit, in G. Howells, I. Ramsey, T. Wilhelmsson, *Handbook of Research on International Consumer Law* (Cheltenham, Edward Elgar, 2010), 367 et seq.

correct behaviour on the market.[21] In addition, the fact that these practices easily lead to over-indebtedness, provided a direct challenge to the 'rational agent' paradigm, cornerstone of the neo-liberal approach.[22] Behavioural economics has shown that consumers are easily confounded and may struggle to make rational decisions, especially when confronted with difficult financial services decisions.[23] The consequence of this is a fragile economy, with individuals living precarious lives without adequate safety nets.

The last financial crisis suggests that regulation needs a profound change to avoid market failures of such scale. The neo-liberal model was proven to be fundamentally flawed, and so was the traditional contract law model, inheriting from it a formalistic nature that lacks a social dimension and a more flexible approach.[24] In this context, fundamental questions emerge with regard to the economic and social implications of contract law and the right balance between the freedom and protection required of the contractual parties in a debt dominated economy.

3. The principle of private autonomy, the weaker party and fundamental rights

Consumer credit contract law is based upon the general and sometimes conflicting principles of private autonomy and protection of the weaker party.[25] Private autonomy, and the related freedom of contract, is recognised as a general principle by EU law and has been a central tenet in the private law systems of its Member States.[26] This concept played a central role in the eighteenth and nineteenth centuries, when contract law focused on maximizing the freedom of

[21] See, e.g. O. Cherednychenko, J.-M. Meinderstma, *Consumer Credit, Mis-selling of Financial Products,* European Parliament Study, Directorate-General for Internal Policies PE 618.997 - June 2018.
[22] I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015), 178-179.

[23] See e.g. A. Lefevre, and M. Chapman (2017), "Behavioural economics and financial consumer protection", OECD Working Papers on Finance, Insurance and Private Pensions, No. 42, OECD Publishing, Paris.

[24] I. Domurath, Mortgage, Debt and the Social Function of Contract (2016) *European Law Journal*, Vol. 22, No. 6, pp. 759-761 et seq; F. Rodl, Contractual Freedom, Contractual Justice, and Contract Law (Theory), 76 *Law & Contemp. Probs.* 59 et seq.
[25] I. Benöhr, *Consumer Protection and Human Rights* (Oxford: OUP, 2013), 121; S. Grundmann, "Information, Party Autonomy and Economic Agents in European Contract Law" (2002) *Common Market Law Review* 39, 271; see also H. Rösler, "Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law" (2010) *ERPL*, 4, 732 et seq.

[26] N. Reich, *General Principles of EU Civil Law* (Intersentia: Cambridge-Antwerp-Portland, 2013) 19; see also G. Comparato & H.-W. Micklitz, "Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU" in U. Bernitz, X. Groussot and F. Schulyok (eds.), *General Principles of EU Law and European Private Law* (Alphen aan den Rijn: Wolters Kluwer, 2013), 121; I. Barral Viñals, Freedom of contract, unequal bargaining power and consumer law on unconscionability, in M. Kenny and J. Devenney (eds.*), Unconscionability in European Private Financial Transactions: Protecting the Vulnerable*, Cambridge: Cambridge University Press, 2010), p. 47.

choice of individuals, while limiting the role of the state.[27] In the twentieth century this liberal approach evolved into a progressively more balanced view as new standards were introduced to protect weaker contractual parties from the effects of unequal bargaining power.[28] As a result of this evolution, present EU law increasingly recognizes as general principles both private autonomy and the protection of the weaker party.

Strong support for the principle of private autonomy can be found in Chapter II of the EU Charter of Fundamental Rights, which is devoted to freedom rights, guaranteeing the "freedom to conduct a business" and the "right to property" in Articles 16 and 17 respectively.[29] While these provisions do not explicitly mention the principle of autonomy nor the freedom of contract, the CJEU refers to contractual freedom in its interpretation of Article 16.[30] For example in *Sky* the Court held that: "(…) Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition (…)." Such a freedom of contract can include "the freedom to choose with whom to do business and the freedom to determine the price of a service."[31]

However, the principle of contractual autonomy is not absolute, as it can be limited by the need to preserve a balance between parties[32] so that contractual freedom is, in the words of Reich, a principle of "framed autonomy."[33] The "solidarity" Chapter IV of the EU Charter affirms, at Article 38, that "Union policies shall ensure a high level of consumer protection." A similar general provision can be found in Article 12 TFEU (Treaty on the Functioning of the European Union), while Article 169 TFEU mentions the right to information and the protection of health,

[27] See R. Korde, Good Faith and Freedom of Contract, (2000), UCL Jurisprudence Review, pp. 142 et seq; see also P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford University Press, 1985); H. MacQueen and S. Bogle, Private Autonomy and the Protection of the Weaker Party: Historical, in S. Vogenauer and S. Weatherill (eds), General Principles of Law: European and Comparative Perspectives, (Hart Publishing: Oxford, 2017), pp. 292 et seq.

[28] See R. Korde, Good Faith and Freedom of Contract, (2000), UCL Jurisprudence Review, p. 142.

[29] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407*;* Art. 16 recognizes "the freedom to conduct a business in accordance with Community law and national laws and practices."

[30] See e.g. N. Reich, *General Principles of EU Civil Law* (Intersentia: Cambridge-Antwerp-Portland, 2013), 28-30.

[31] Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, EU:C:2013:28, paras. 42-43; see also N. Reich, *General Principles of EU Civil Law* (Intersentia: Cambridge-Antwerp-Portland, 2013), 28-30.

[32] O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich: Sellier, 2007).

[33] For more on the freedom to contract see N. Reich, *General Principles of EU Civil Law* (Intersentia: Cambridge-Antwerp-Portland, 2013), 28-30.

safety and economic interests of consumers.[34] Although the precise terms "weaker party" do not appear here, these provisions imply the necessity of a balance between contractual parties, thus delineating the principle of protection of the weaker one.

This principle has also been implicitly incorporated in secondary legislation, such as the Directive on Unfair Contract Terms.[35] According to Article 3.1: "(a) contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." While it is the role of the national courts to examine whether specific terms are unfair, the CJEU has become very active in this respect, increasingly referring to the principle of the weaker party to justify an innovative interpretation of the Directive which is favourable for the consumer.[36]

Traditionally, the principle of the weaker party has been applied as an exception to the principle of contract freedom, and was perceived as a paternalistic intervention by the state restricting the parties' liberty, which should be avoided.[37] This approach has been criticised by scholars who instead attribute the same status to both principles, and argue in favour of a stronger recognition of the social dimension of contract law.[38] Embracing a concept of substantive contractual freedom, according to which the parties should not only have *formal* but also *substantive* freedom in contractual relationships, this article is closer to the latter approach to avoid a 'factual subjugation of the weaker party'.[39] This idea is in turn based on a broader conception of fairness and personal autonomy, to be achieved via a level of social protection that redresses a balance of power otherwise tilted in favour of financial services providers.

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[34] See more in I. Benöhr, *EU Consumer Protection and Human Rights* (Oxford: OUP, 2013), 58.

[35] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, pp. 29–34.

[36] See for instance Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, ECLI:EU:C:2010:659 and C-415/11, *Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164. The latter case will be analysed in detail in part 5 below. For an analysis of the case law see H. Micklitz and N. Reich, The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive, *CMLR* 51, 2014, pp. 771-808; see also N. Reich, *General Principles of EU Civil Law* (Intersentia: Cambridge-Antwerp-Portland, 2013), pp. 47-48.

[37] For a jurisprudential perspective see D. Kimel, Personal Freedom and the Protection of the Weak Through the Lens of Contract: Jurisprudential Overview, in. S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015).
38 A. Colombi Ciacchi, Freedom of contract as freedom from unconscionable contracts, in M. Kenny, et al. (ed), Unconscionability in European Private Financial Transactions: Protecting the Vulnerable (Cambridge University Press, 2010), pp. 7 et seq.

39 Ibid.

The next two sections of the article examine the EU regulatory framework and its focus on information and private autonomy, highlighting potential limitations in protecting the weaker party. The following section will then analyse the CJEU's case law, dealing with the tension between private autonomy and protection of the weaker party. The final section proposes a comprehensive financial consumer protection model, based on behavioural economics and substantive autonomy.

4. EU Regulatory Framework

The financial crisis spurred renewed interest in regulating credit, while seeing consumer protection as a fundamental element to maintain financial stability.[40] The ensuing debate had thus to confront the seemingly contrasting objectives of facilitating access to financial markets, but discouraging excessive lending and over-indebtedness.

In the EU, this discourse has been influenced by two regulatory models for financial services. The first is inspired by a neo-liberal doctrine, which sees consumers as rational decision makers, who mainly need to be empowered through detailed information.[41] The second is based on a social market doctrine, which advocates wider intervention by the state, for example in the form of sanctions on banks for irresponsible lending practices or interest rate limitations.[42] The first paradigm seems to have had a dominating influence on the Consumer Credit Directive, upholding the principle of contractual freedom more than the protection of the weaker party.

[40] See e.g. N. Moloney, "Financial market governance and consumer protection in the EU" in A. Faia, A. Hackentahl, M. Haliassos and K. Langenbucher (eds), *Financial Regulation: A Transatlantic Perspective* (Cambridge: CUP, 2015) 221 et seq.; S. Brown, "EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?" (2015) EBLR, 555 et seq.; see also F. Akinbami, "Financial services and consumer protection after the crisis" (2011) *International Journal of Bank Marketing*, Vol. 29 Iss 2, 134 – 147.

[41] See more in C. Garcia Porras and W. van Boom, "Information disclosure in the EU Consumer Credit Directive: opportunities and limitations" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 23-24.

[42] Ibid.

4.1. The Consumer Credit Directive

The current Consumer Credit Directive was proposed by the European Commission before the outbreak of the financial crisis in 2002 and was adopted in 2008.[43] This Directive aims at promoting an integrated credit market and guaranteeing a high level of protection for the consumer, covering consumer credit agreements ranging from €200 to €75,000 but excluding mortgage agreements.[44]

Focusing mainly on information disclosure,[45] it requires that consumers receive detailed information during the pre-contractual and contractual process. For example, at the advertising stage, financial services providers have to inform consumers about the general conditions of the credit, including fees and charges (Article 4). The information has to be provided by applying the standard European consumer credit information form (Articles 5 and 6), which is meant to facilitate the understanding and comparison of different products. This information includes the duration of the credit contract, the annual percentage rate of charge and the total amount payable, so that the consumer is aware of the risks and costs of the contract.

Although the Directive predominantly aims to improve transparency, it also includes some additional consumer rights and introduces new responsible lending duties for providers. Under the Directive, the consumer has the right to withdraw from the credit contract within a "cooling off" period of 14 days of the conclusion of the agreement (Article 14). This allows the consumer time to reconsider the contract and aims to avoid risks related to impulse purchases. Furthermore, the consumer has the right to an early repayment of the credit (Article 16).

Importantly, the Directive introduced for the first time an obligation to offer responsible credit, which requires that the creditor assesses the creditworthiness of the consumer on the basis of the information received from the latter and by consulting specific databases. The creditor also

[43] Directive 2008/48/EC on credit agreements for consumers was adopted on 23 April 2008.

[44] On the scope of the Directive and the exclusion of vulnerable consumers see e.g. S. Brown, "European regulation of consumer credit: enhancing consumer confidence and protection from a UK perspective?" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 70 et seq.

[45] See more in C. Garcia Porras and W. van Boom, "Information disclosure in the EU Consumer Credit Directive: opportunities and limitations" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 21-55.

has to provide advice to consumers before they enter into a credit contract, to enhance the financial understanding and choice of the consumer (Articles 8 and 9).[46]

While these innovations can be regarded as important, the Directive seems deficient in at least two respects: on the one hand, it may have a limited practical impact as it does not impose specific sanctions in the case of non-compliance. On the other hand, some of its provisions are, to some extent, questionable. First of all, while in principle the creditworthiness assessment seems sensible, this may have a serious side-effect as it may exclude from credit the financially vulnerable consumers who, paradoxically, are those most in need of credit.[47] Second, the obligation to provide advice is clearly exposed to the risk that such advice is biased, and therefore not helpful in making the right decisions.[48]

Looking at the Directive from a more general perspective, it seems to be influenced by a neo-classical view of market regulation, largely silent on matters of fairness and inclusion, and preferring information as a lighter means of intervention to mandatory law.[49] This seems to suggest an image of the consumer as a rational actor who understands the market and makes well-reasoned and coherent decisions.[50]

Although this approach may sometimes place a healthy degree of responsibility on consumers, consistent with the average, reasonably well-informed and circumspect consumer concept developed by the CJEU case law,[51] there is abundant evidence that not all consumers behave this way. Behavioural economic studies have instead indicated that humans are heavily influenced by 'framing effects' (on which credit advertising is based) and may struggle to make

[46] For the responsible credit approach in the UK see K. Fairweather, "The development of responsible lending in the UK consumer credit regime" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 84-110.

[47] U. Reifner, "Verantwortungsvolle Kreditvergabe im europäischen Recht" in L. Thévenoz & N. Reich (eds), *Liber amicorum Bernd Stauder, Consumer Law* (Baden-Baden: Nomos 2006), 383-403; see also I. Benöhr, *EU Consumer Law and Human Rights* (Oxford: OUP, 2013), 120-121.

[48] See e.g. R. Inderst and M. Ottaviani, "How (not) to pay for advice: A Framework for consumer financial protection" (2012) *Journal of Financial Economics*, 105, 292-411.

[49] Regarding the neo-classical regulation model see S. Nield, "Mortgage finance: who's responsible?" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 167 et seq.; T. Hartlief, "Freedom and Protection in Contemporary Contract Law" (2004) 27 *J. Consumer Policy*, 258 et seq.

[50] H. Rösler, "Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law" (2010) ERPL, 4, 736.

[51] E.g. Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, EU:C:1998:369; see also O. Cherednychenko, "Fundamental Rights, European Private Law, and Financial Services" in H. Micklitz (eds), *Constitutionalization of European Private Law* (Oxford: OUP, 2014), 193-195.

rational decisions.[52] In addition, information *per se* is not sufficient for an individual to make rational decisions; the way it is presented is also crucial.

The fact that the Directive introduced a 'Standard European Consumer Credit Information Form' reveals that some of these issues were present in the legislator's mind. However, any quest for an 'ideal' communication standard in this domain is bound to be constricted, on one side by the risk of being over-prescriptive and, on the other, by the danger of being too vague – the outcome of which is ineffectiveness in any case, as over-prescriptive rules can typically be formally met but substantially circumvented.

In addition, too much emphasis on the informational aspect may yield only marginal benefits, as information may ultimately meet serious limits in the ability of consumers to deal with complexity and risk. In conclusion, while information is important, effective consumer protection should be placed in a broader framework which considers consumer protection, access to credit and social justice as a whole.[53] While admittedly more ambitious than just regulating information, this is also more promising.

Interestingly, the EU has become more sensitive to these aspects after the recent financial crisis. As we will see later, these considerations surface in the new Mortgage Credit Directive, and in the recent CJEU case law, where the consumer is frequently characterized as the weaker and vulnerable party, while the Charter provisions play an increasingly important role in the Court's reasoning. The following section therefore examines the Mortgage Credit Directive, before moving on to the CJEU jurisprudence.

4.2. The Mortgage Credit Directive

The recent Mortgage Credit Directive was adopted in 2014 in the aftermath of the financial crisis and applies to credit agreements relating to residential immovable property.[54] Its objective is to establish a Union-wide mortgage credit market, promoting a high level of

[52] See e.g. I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015), 173 et seq.

[53] See more in I. Benöhr, *EU Consumer Law and Human Rights* (Oxford: OUP, 2013), 120-121.

[54] Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property; see also S. Nield, "Mortgage finance: who's responsible?" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 160-181.

consumer protection. Member States had to implement the Directive into their national law by March 2016.

While this Directive is similar to the Consumer Credit Directive in its focus on consumer information requirements, it seems to indicate a new trend by incentivizing good conduct by financial services providers and promoting consumer capability instruments.[55] For example, the Mortgage Credit Directive includes standards for the performance of services regarding conduct of business, staff competence and knowledge requirements.

In particular, according to Article 7, Member States have to ensure that "the creditor, credit intermediary or appointed representative acts honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers". This means, for example, that "In relation to the granting, intermediating or provision of advisory services on credit and, where appropriate, of ancillary services the activities shall be based on information about the consumer's circumstances and any specific requirement made known by a consumer and on reasonable assumptions about risks to the consumer's situation over the term of the credit agreement." [56]

Furthermore, the Directive sets certain standards on how creditors remunerate their staff and credit intermediaries. Recognizing the importance of incentives, Article 7 para 3, adds that, regarding remuneration, the bank has to comply with the following principles:

(a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking that exceeds the level of tolerated risk of the creditor;

(b) the remuneration policy is in line with the business strategy, objectives, values and long-term interests of the creditor, and incorporates measures to avoid conflicts of interest, in particular by providing that remuneration is not contingent on the number or proportion of applications accepted.

[55] S. Brown, "EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?" EBLR (2015), 565.

[56] For the responsible credit approach in the UK see K. Fairweather, "The development of responsible lending in the UK consumer credit regime" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 84-110.

Finally, the remuneration structure of the financial services provider should not prejudice the ability of the staff providing advisory services to act in the consumer's best interest.[57]

The Directive also introduces the general principle of financial education with Art. 6 requiring Member States "to promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements." These provisions aim to enhance the consumers' understanding of the implications of the financial services.

The inclusion of these provisions on fair conduct and financial education in the Mortgage Credit Directive indicates a change of approach by the EU legislators towards a more comprehensive protection of consumers.[58] This seems to reflect a first step in the recognition of the consumer as the weaker party who may require financial education before making well informed and autonomous decisions, and thus effectively respecting the principle of autonomy.

However, it remains unclear whether this Directive will be effective in addressing some of the problems uncovered by the financial crisis.[59] First, the Mortgage Credit Directive focuses to a large extent on information as a regulatory tool as discussed in the previous section. Second, the requirement for creditworthiness checks will only be effective if sanctions are imposed, as seen with the Consumer Credit Directive. Third, it is not clear how the new requirements for the remuneration strategy of staff can be implemented in practice, because of deeply rooted conflicts of interest between consumers and business providers.[60] Fourth, the differences in approach between the Consumer Credit Directive and the Mortgage Credit Directive may lead to diverging standards of financial consumer protection in the EU, for example in relation to

[57] See I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill, and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, (Oxford: Hart, 2015), 159 et seq.

[58] See I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill, and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015), 159 et seq.; see also S. Brown, "EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?" EBLR (2015), 565.

[59] See S. Brown, "EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?" EBLR, (2015), 565.

[60] Some evidence shows that consumers are often confused as to whether the explanation provided by the business provider is non-biased information or advice as to the most suitable product; see e.g. S. Nield, "Mortgage finance: who's responsible?" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 167 et seq.

responsible lending.[61] Finally, the current regulation seems reluctant to address the social aspects that may result from credit enforcement and foreclosure. Article 28 (1) of the Directive on arrears and foreclosure only contains a rather weak provision mentioning that: "Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated." This general provision seems to offer little protection to consumers in such cases, which is regrettable given the objective vulnerability of families in these circumstances. Scholars like Cherednychenko[62] argue that, in the European struggle to reconcile different approaches in Member States into a common, "right balance between private autonomy and consumer protection", the vulnerable consumer ends up being the main victim. This search for a compromise made it difficult for the EU to adopt a strong financial consumer protection framework.

Interestingly, the Unfair Contract Terms Directive and the Charter of Fundamental Rights has offered a basis for the CJEU to refer to the consumer as the weaker contractual party, who deserves additional protection. This case law will be discussed in the following section.

5. EU case law on credit agreements and unfair contract terms

After the financial crisis, a growing number of consumers encountered difficulties in repaying their debts. Spain has been particularly affected by this phenomenon where the credit agreements often contain harsh contractual terms for the consumers. In a number of cases consumers contested the validity of these terms to avoid eviction from their homes and the national courts have requested preliminary references from the CJEU to test the compliance of national law with EU law. The CJEU has recognised that in these cases the consumer is in a weak position vis-à-vis the financial services provider, referring to the Unfair Contract Terms Directive and relying increasingly on the Charter of Fundamental Rights as a key reference point to ensure effective protection. This recent case law has generally strengthened financial consumer protection at the national level. The following case studies illustrate this point.

[61] See O. Cherednychenko, "Fundamental Rights, European Private Law, and Financial Services," in H. Micklitz, *Constitutionalization of European Private Law* (Oxford: OUP, 2014), 193-195; see I. Ramsey, "Changing Policy Paradigms of EU Consumer Credit and Debt Regulation" in S. Weatherill and D. Leczykiewics (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart, 2015).

[62] See O. Cherednychenko, "Fundamental Rights, European Private Law, and Financial Services", in H. Micklitz, *Constitutionalization of European Private Law* (Oxford: OUP, 2014), 193-195.

5.1. Banco Español case

In *Banco Español* a consumer, Mr Calderón Camino, had concluded a loan contract for the sum of €30,000 with the Spanish bank Banesto to purchase a car.[63] The interest rate was fixed at 7.950% and the rate of interest for late payments at 29%. When Calderón Camino missed some of his repayments, Banesto submitted an application before the national court for an order for payment. The Court of First Instance held of its own motion that the term relating to interest for late payment was void because it was unfair, and reduced the interest rate from 29% to 19%. Subsequently, the Court of Appeal asked the CJEU whether the Directive on unfair contractual terms precludes national legislation, which does not allow the court before which an application for order for payment has been brought to assess of its own motion whether a term in a consumer contract is unfair.

Assessing the first question the CJEU referred to the principle of the protection of the weaker party, holding that "the system of protection introduced by Directive 93/13 on unfair terms is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms".[64]

Therefore, in order to protect the weaker party, Article 6 of the Directive provides that unfair terms are not binding on the consumer. It aims to replace the formal balance which the contract establishes with an effective balance to re-establish equality between the parties.[65] This imbalance may require positive action by the national court, which is obliged to examine of its own motion whether a contractual clause is unfair, thereby compensating for the imbalance.[66]

This case confirms previous case law such as *VB Pénzügyi Lízing,*[67] where the principle of the protection of the weaker party was already recognized. According to Reich this approach is not only applicable to the Unfair Contract Terms Directive, but can also be regarded as a general approach by the CJEU to consumer law in the Union. The Court interprets party

[63] Case C-618/10, *Banco Español de Crédito SA v. Joaquín Calderón Camino,* EU:C:2012:34914.

[64] Case C-618/10, *Banco Español*, para. 39.

[65] See Case C-618/10, *Banco Español*, para. 40; Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, EU:C:2006:675, para. 36.

[66] Case C-618/10, *Banco Español*, para. 41-42; *Mostaza Claro,* para. 38; Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi,* EU:C:2009:350, para 31.

[67] Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, EU:C:2010:401, para. 49

autonomy in business to consumer agreements in favour of the consumer as the weaker party in relation to the company which is regarded as the stronger party.[68]

The opinion of AG Trstenjak on *Banco Español* reflects a similar approach. In her analysis of question two, intended to give the national court guidance on the interpretation of Article 6 (1) of the Unfair Contract Terms Directive, she refers to AG Tizzano's balancing of contractual freedom and the principles of the weaker party in the *Ynos* case.[69]

The national court requested whether Spanish legislation allowing a court not only to set aside but also to revise the content of unfair terms is compatible with Directive 93/13. Clarification was needed on this point as the Unfair Contract Terms Directive 93/13 does not expressly provide for the 'replacement' of unfair terms, but only prescribes the legal consequence of such terms not being binding on the consumer.

According to Tizzano "the aim of the Directive is to rebalance the contractual position of the consumer by preventing him 'from being bound by an unfair term' rather than to safeguard the contractual freedom of the parties, and particularly that of the seller or supplier (…)."[70] From this perspective, a change to the contractual terms would mainly serve the interests of the seller, which would mean that the effectiveness of the Directive could no longer be ensured.

Trstenjak agreed with this view holding that the modification of an agreement would diminish the risk to a seller including unfair terms in consumer contracts, as a non-binding term is likely to be less favourable to the seller than a mere modification of the term. This means that the national court should not replace or modify a clause but it should only set aside an unfair term.[71]

The CJEU followed the AG's opinion highlighting the aim of protecting the consumer as the weaker party and the role of the Directive in raising the standard of living and the quality of life of consumers throughout the European Union.[72] According to the Court "given the nature and significance of the public interest which constitutes the basis of the protection guaranteed

[68] N. Reich, *General Principles of EU Civil Law* (Intersentia: Cambridge-Antwerp-Portland, 2013), 47-48.

[69] Opinion of AG Trstenjak in Case C-618/10, Banco Español de Crédito, SA v Joaquín Calderón Camino, EU:C:2012:74, para. 88 and footnote 103.

[70] AG Tizzano in Case C-302/04 *Ynos kft v János Varga*, EU:C:2005:576.

[71] Opinion of AG Trstenjak, in Case C-618/10, Banco Español de Crédito, para. 88-89.

[72] Case C-618/10, *Banco Español de Crédito*.

to consumers, who are in a weak position vis-à-vis sellers or suppliers, Directive 93/13 requires Member States, to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'".[73] Therefore Article 6 (1) of the Directive does not allow a national provision which authorises the Member State's court to modify a consumer agreement to replace an unfair term.

In conclusion, the Court confirmed the principle of the protection of the weaker party, recognising the need to counterbalance unequal bargaining powers in consumer to business relationships. The principle of the weaker party is more important than the principle of contractual freedom, in order to deter unfair terms in the future. The question remains if a contractual clause needs to be fully removed instead of permitting a simple modification by the national court of the clause in order to protect the consumer. Other means of deterrence might be possible, such as a fine imposed on the seller, which would also be more in line with the autonomy of Member States, as this question is not clearly regulated by EU law.

In subsequent case law, which regarded disputes on the enforcement of consumer mortgage agreements, the CJEU confirmed the principle of the weaker party, which will be assessed below.[74]

5.2. Aziz case

In *Aziz* a consumer had concluded a loan agreement with a bank in Spain to finance his home and created a mortgage to secure that loan. When he experienced difficulties in repaying the loan the bank initiated a simplified mortgage enforcement proceeding under Spanish law. As a result, an auction of his home was arranged, but as no bid was made the bank acquired ownership of the property at 50% of its value, in accordance with the Spanish law and the consumer was evicted from his home.

After the enforcement proceedings the consumer complained that a clause of the loan agreement was unlawful because it was unfair. In particular, the loan agreement provided that, in the event of default by the debtor in respect of just one of the total of 396 monthly instalments to be paid during the 33-year term of the agreement, the lending bank may automatically call in the totality of the loan.

[73] Case C-618/10, *Banco Español de Crédito*, para. 68.

[74] Case C-415/11, *Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164.

The competent court in Spain referred the case to the CJEU asking essentially whether Directive 93/13 must be interpreted as precluding national legislation, which does not allow in mortgage enforcement proceedings for grounds of objection based on unfair contractual terms and at the same time it does not authorise the court before which declaratory proceedings have been brought to stay the enforcement proceeding. Furthermore, it asked whether individual terms of the loan agreements were unlawful.

Replying to question one the CJEU confirmed the previous case law on Directive 93/13, recognizing that "the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (…)."[75] Therefore, as regards that weaker position, Article 6 (1) of the Directive provides that unfair terms are not binding on the consumer. Furthermore, the national court is required to assess of its own motion whether a contractual term falling within the scope of the Directive is unfair.

However, the mortgage enforcement procedure has not been harmonized in EU law, so that this remains a matter of national law as long as the principle of equivalence and effectiveness are respected. The Court decided that the Spanish procedural rule did not comply with the principle of effectiveness, because the national court responsible for the assessment of the unfair term is precluded from staying the mortgage enforcement proceedings. As a result, the consumer obtains only "subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7 (1) of Directive 93/13."[76] Importantly, the Court highlighted the fact that this would have particularly severe consequences for the consumer where the mortgaged property is the family home of the consumer whose rights have been infringed, since that would mean that consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.

In relation to question two the Court followed closely the opinion of AG Kokott, who provided some indication on how contractual imbalance and unfairness of a term on the basis of Article 3 of Directive 93/13 should be assessed by the national courts.

[75] *Banco Español*, para. 39.

[76] See Case C-415/11, *Aziz*, para. 60; Opinion of Advocate General Kokott in Case C-415/11, Aziz v Catalunyacaixa, 2012, EU:C:2012:700, para. 50.

Contrary to the view of the Commission, which considered a contractual term requiring the repayment of the full loan after the non-payment of only one instalment to be effective in abstract terms and in isolation of the legal system, she was of the opinion that an assessment of such an unfair term needs to be done in comparison with the legal situation under national law and requires a balancing of the interests of both contractual parties. In particular she stressed that "Article 3 of Directive 93/13 expressly requires that a contractual term be regarded as unfair only if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[77] As a result, the principle of contractual freedom is respected as it is recognized that individuals should be able to determine their relations according to their interests.

However, a significant imbalance "should be considered to be unjustified in particular where the consumer's rights and obligations are curtailed to such an extent that the party stipulating the contractual conditions could not assume, in accordance with the requirement of good faith that the consumer would have agreed to such a provision in individual contract negotiations."[78]

The national courts of the Member States have to examine whether a term in the general terms and conditions of consumer contracts is unfair. In particular, the court should examine "the extent to which the term derogates from the otherwise relevant statutory provisions, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection."[79]

The CJEU followed the AG's opinion closely ruling that national legislation which does not allow the court before which declaratory proceedings have been brought to grant interim relief is unlawful, where such relief is necessary to guarantee the full effectiveness of its final decision. The Court's assessment illustrates a careful balancing between the principle of private autonomy, which would mean preserving the original contract, and the principle of the protection of the weaker party, which would allow the application of the Unfair Contract Terms Directive. Although the Court does not refer explicitly to the fundamental rights dimension in

[77] Opinion of Advocate General Kokott in Case C-415/11, Aziz, para. 73.

[78] Opinion of Advocate General Kokott, Case C-415/11 Aziz, para. 74.

[79] Opinion of Advocate General Kokott, Case C-415/11 Aziz, para. 75.

this case there seems to be an implicit influence of the Charter, which protects the consumer and recognises the right to respect for the home.[80]

Instead of deciding on a specific outcome, the Court left it to the national court to undertake a proportionality analysis to determine a fair balance between the conflicting principle of private autonomy and the protection of the vulnerable party. According to Gerstenberg, this proportionality assessment and a rigorous balancing of rights avoided a result that is one-sided and helped to improve the national legislation to protect consumers, having a regulatory effect.[81]

The *Aziz* case had important implications for Spanish procedural law as, following the CJEU ruling, the Spanish authorities introduced new legislation to enhance the protection of mortgage debtors. The new legislation included modifications to the rules of mortgage procedures,[82] which allow consumers to object to mortgage enforcement proceedings if the contract includes unfair terms. These changes can be regarded as a first step in recognising and protecting the consumer as the weaker party in mortgage contracts.

However, in the following year the new provisions were indirectly called into question by the national court in the *Morcillo* case, which will be discussed in the next section.

5.3. Sánchez Morcillo case

In *Morcillo* the CJEU again had to decide on the conformity of the mortgage enforcement law in Spain relating to unfair terms in consumer contracts but, in this case, the Court went a step further, undertaking a fundamental rights assessment of the rights to an effective remedy.[83]

In this case two consumers had signed a loan agreement with the Banco Bilbao, which was secured by a mortgage on their property. When the consumers failed to make monthly

[80] See H. Micklitz, "The Consumer: Marketised, Fragmentised, Constitutionalised", in D. Leczykiewicz and S. Weatherill (eds), *The Images of the Consumer in EU Law*, (Hart: Oxford, 2016), 35-38; see also O. Cherednychenko, "Fundamental Rights, European Private Law, and Financial Services", in H. Micklitz, *Constitutionalisation of European Private Law* (Oxford: OUP, 2014) 199 et seq.

[81] O. Gerstenberg, "Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts" (2015) *European Law Journal*, vol. 21, no. 5, 614-616.

[82] Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, restructuración de deuda y alquiler social BOE No 116, of 15 May 2013; see I. Barral-Viñals, "Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain" (2015) *Penn State Journal of Law and International Affairs*, vol. 4, 91-93.

[83] Case C-169/14 *Juan Carlos Sánchez Morcillo María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA*, EU:C:2014:2099.

payments the bank brought an enforcement proceeding against which the former lodged an objection, which was rejected by the Court of First Instance. The consumers then brought an appeal against this decision which was sent before the Provincial Court.

Under Spanish law an appeal can be brought against a decision which upholds the objections by a debtor and thereby terminates the enforcement proceeding. However, it does not allow the debtor whose objection has been rejected to lodge an appeal against this judgment.[84]

Therefore, the national court referred two questions to the CJEU, expressing doubts as to whether the disparity between the parties in the national legislation is compatible with the objectives of the Unfair Contract Terms Directive 93/13 and with the right to an effective remedy guaranteed by Article 47 of the Charter.

Essentially, the national court asked whether the right to effective judicial protection prohibits a national provision that does not permit a party against whom enforcement proceedings are brought to appeal against the decision dismissing the objection to enforcement.

The CJEU stressed that mortgage enforcement proceedings deal with the dwellings of consumers, which can be regarded as an essential need, for which effective judicial protection should be guaranteed.[85] In contrast, the Spanish mortgage enforcement procedures "jeopardise the effectiveness or consumer protection intended by Directive 93/13, read in conjunction with Article 47 of the Charter" as it "reinforces the inequality of arms" between the creditors in mortgage enforcement proceedings and consumers.[86] On this basis, the Court decided that the Spanish procedural law was not compatible with the Directive on unfair terms, nor with the Charter, failing to provide adequate and effective judicial means of protection.[87]

The *Morcillo* judgement was significant because, in contrast to the previous *Aziz* case, the CJEU applied an explicit fundamental rights assessment thereby elevating consumer protection of the debtor to the human rights level.[88] The Court confirmed that national procedural law has to comply with the fundamental right to effective judicial protection, recognizing the consumer

[84] Case C-169/14 *Sánchez Morcillo*, para. 17.

[85] Case C-169/14 *Juan Carlos Sánchez Morcillo*, para. 38.

[86] Case C-169/14 *Juan Carlos Sánchez Morcillo*, para. 46 and 50.

[87] Case C-169/14 *Juan Carlos Sánchez Morcillo*, paras. 43 and 50; see also the case analysis by Di Nero, 'The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kusonova*' (2015) *Common Market Law Review* 52: 1009-1032, at 1013.

[88] See also Di Nero, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušionová* (2015) *Common Market Law Review* 52, 1010-1011.

as the weaker party who requires a high level of protection vis-à-vis the provider.[89] Interestingly, the Court recognized the fact that in this specific case the consumer risked losing the family home and required a higher level of protection, applying a "social oriented" effectiveness test of the national law.[90] The Court stressed that a dwelling represents an essential need of the consumer and thus applied a broad interpretation of Article 47 of the Charter in relation to the principle of equality of arms of the parties, holding that the national procedural law was in breach of EU law.

As a result of this ruling the Spanish procedural law was modified to provide the consumer with the right to lodge an appeal against an order which rejected his objection.[91] The EU ruling thus again strengthened consumer protection at the national level, confirming the principle of the protection of the weaker consumer party. At the same time, this far-reaching decision limits the conflicting principle of private autonomy and curtails the principle of national procedural autonomy.

5.4. Monika Kušionova case

Unlike in the previous cases, *Kušionova* concerned the lawfulness of an extra-judicial mortgage enforcement proceeding in which the Court affirmed the importance of the protection of the family home as a fundamental right.

In this case the referring court had to establish whether a contractual term in a consumer credit agreement which was secured by a charge on the family home should be considered fair although it included an extrajudicial enforcement of the charge. The national court asked the CJEU essentially whether, in light of Article 38 of the Charter, Directive 93/13 must be interpreted as precluding national legislation, which allows for the recovery of a debt that is based on potentially unfair contract terms by the extrajudicial enforcement of a charge on immovable property.

[89] Di Nero, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušionová* (2015) *Common Market Law Review* 52, 1010-1011.

[90] Di Nero, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušionová*, (2015) *Common Market Law Review* 52, 1020-1021.

[91] Royal Decree-Law No. 11 of 5 Sept. 2014: de medidas urgentes en materia concursal (BOE no. 217, de 6 de septiembre de 2014, p. 69767).

The Court undertook a more detailed fundamental rights assessment than in the previous case, highlighting the fact that although only Article 38 of the Charter was mentioned in the preliminary ruling request, Article 47 of the Charter was also of a particular importance in this case, as it guarantees the right to an effective judicial remedy.[92] As in previous case law the Court recognized the consumer as the weaker party in a contract with a business, referring to Article 38 of the Charter to confirm this principle, which provides that European Union policies must ensure a high level of consumer protection.[93] Furthermore, the Court stressed that "(t)he loss of a family home is not only such as to seriously undermine consumer rights (…), but it also places the family of the consumer concerned in a particularly vulnerable position."[94]

According to the European Court of Human Rights "the loss of a home is one of the most serious breaches of the right to respect for the home" and therefore individuals who risk losing their house should be able to request a proportionality assessment of such a measure.[95] At the EU level, Article 7 of the Charter also recognizes the fact that everyone has the right to respect for his or her home which the national courts must take into consideration when implementing the Directive 93/13.

Despite these references to fundamental rights, in the present case, the CJEU decided that the national legislation was compatible with EU law, provided that it did not make it excessively difficult or impossible in practice to protect the consumer's rights in the Directive 93/13. In line with the principle of effectiveness the national law allowed that a sale by auction could be contested within a certain time limit and the courts could declare the sale void retrospectively, which enhanced consumer protection.[96] Furthermore, the national court could impose interim measures, which indicated that adequate and effective measures existed to prevent the prolonged use of unfair terms.[97]

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[92] Case C-34/13 *Monika Kušionová v SMART Capital a.s.*, EU:C:2014:2189, para 63; see also *Sánchez Morcillo and Abril García*, EU:C:2014:1388, para 45.

[93] Judgments in *Pohotovosť*, EU:C:2014:101, para. 39; *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282 para. 39 and the case-law cited; and *Sánchez Morcillo* C-169/14, EU:C:2014:2099, para. 22.

[94] Case C-34/13 *Monika Kušionová v SMART Capital a.s.*, para 63; see also *Sánchez Morcillo*, EU:C:2014:1388, para 11; see the judgment in *Aziz*, EU:C:2013:164, para. 61.

[95] Judgments of the European Court of Human Rights in *McCann* v *United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk* v *Sweden*, application No 27183/04, paragraph 137).

[96] Case C-34/13 *Monika Kušionová v SMART Capital a.s.*, para 65-61.

[97] Case C-34/13 *Monika Kušionová v SMART Capital a.s.*, para 66.

The case law illustrates that the Court increasingly bases its reasoning on fundamental rights, recognising explicitly for the first time the fundamental right to respect for the home in relation to the enforcement of mortgage agreements, which has to be taken into account by the courts in the Member States. This reflects the principle of the protection of the weaker party, as the court recognises the need to protect the home of the consumer and vulnerable family members living in the accommodation.

However, the Court did not apply a balancing test between different fundamental rights, such as the right of respect for the home against the right of the creditor to freely conduct a business, which reflects the autonomy principle. Instead, as in previous cases, the principle of effectiveness played a central role in determining the outcome of the case. Although fundamental rights had to be respected there is no need to limit the contractual freedom of the parties in this case if the national law provides effective remedies for the consumer.

According to Di Nero, the Court applied a rather abstract and narrow test of the context and did not sufficiently take into account the economic and legal challenges that consumers face in enforcement procedures.[98] While the national court focused on time-limits for lodging a case, it did not sufficiently consider that in a voluntary auction national courts cannot review unfair terms ex officio or take positive actions in Slovak law to protect consumers against information and economic imbalances.[99]

The case law shows that although the CJEU increasingly relied on fundamental rights in its assessment, the outcome of the judgments can vary significantly depending on the case and the effectiveness test that the Court applies. In *Kušionová*, the assessment remained incomplete as the Court did not balance conflicting rights and did not provide specific directions to the national courts on how to undertake such an assessment, which might lead to incoherent outcomes.[100]

[98] Di Nero, 'The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušionová*', *CMLR* 52, 2015, p. 1024 et seq.

[99] Di Nero, 1024 et seq.

[100] Di Nero, 1022-1023.

5.5. Overall assessment of the case law

The CJEU can be regarded as a court of last resort for consumers and their support groups when they encounter a protection deficit in their national legal system.[101] As we saw, the Court has recently shifted the focus away from the principle of party autonomy to a consumer oriented interpretation of EU law, placing greater emphasis on the protection of the weaker party.[102] Furthermore, it has been increasingly referring to the rights of the Charter, and has been moving away from a procedural law analysis to a more substantive law assessment. However, the Court has refrained from balancing conflicting fundamental rights, focusing on the Charter rights that protect the weaker party.

This focus towards protection may be desirable in individual court cases in order to redress legislative gaps. But still, the resulting message and guidance to the Member States remains ambiguous, as the Court has de facto refrained from spelling out a comprehensive analysis of fundamental rights leading to a satisfactory compromise between them.

As the regulatory framework – as opposed to the jurisprudence – remains focused on autonomy, the question of ensuring a balance between freedom and protection remains unsettled. Overall, the case law only provides partial improvements at the national level without offering a broader solution for a coherent financial protection framework for consumers. Important challenges persist at the EU and national level in relation to the over-indebtedness of consumers, protection with regard to specific financial products and foreclosure procedures.[103]

Therefore, it is important to address these challenges at the regulatory and the policy level, in particular in relation to the vulnerable consumer and effective remedies in foreclosure procedures.[104] This will require a delicate balance between the principles of party autonomy and the protection of the weaker party.

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[101] H. Micklitz and N. Reich, The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive, *CMLR* 51, 2014, p. 805; O. Gerstenberg, Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts, *European Law Journal*, vol. 21, no. 5 September 2015, pp. 614-616.

[102] Di Nero, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušionová*, *CMLR* 52, 2015, p. 1031.

[103] See e.g. I. Barral-Viñals, Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain, *Penn State Journal of Law and International Affairs,* Volume 4, 2015, 93-95.

[104] H. Micklitz and N. Reich, The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive, *CMLR* 51, 2014, pp. 771-808.

6. A proposal for new directions in EU financial consumer protection

The previous sections highlighted deficiencies in the current EU financial consumer protection framework and explored the impact of the related CJEU case law. The present one proposes new directions for a more effective financial consumer protection system. In particular, it explores elements which can help strike a fair balance between contractual freedom and the protection of the weaker party, drawing inspiration from international best practices and guidelines in the banking sector.

Three recent initiatives will be considered: the G20 High Level Principles on Financial Consumer Protection adopted in 2011, the recommendations on financial consumer protection adopted by the World Bank in 2012 and the 2016 revised UN Guidelines. While different, all three sets of recommendations are predicated on the principle, well known in behavioural economics that not all consumers are able to make rational decisions, and that firms should therefore behave responsibly in their own long-term interest.[105] In the case of financial services this means, for example, that financial services providers should assume an active role in examining credit sustainability, moving beyond a mere information disclosure.[106]

The remainder of this section touches upon seven elements that appear across the aforementioned initiatives, and which are particularly relevant for the European case. In so doing it will show how, together, these elements may provide the foundation of a legal framework able to blend fundamental rights into an effective system of consumer protection.

6.1. Fair treatment and compensation structures

Fair treatment and disclosure are essential elements for financial consumer protection, according to the 2016 UN Guidelines for Consumer Protection.[107] As for fair treatment, this implies that, among other considerations, the providers should promote responsible credit. Concerning the latter, the Guidelines state, financial services providers should try to avoid conflict of interest in their compensation structure by providing written policies on the

[105] See e.g. A. Lefevre, and M. Chapman (2017), "Behavioural economics and financial consumer protection", OECD Working Papers on Finance, Insurance and Private Pensions, No. 42, OECD Publishing, Paris.

[106] See e.g. S. Nield, Mortgage finance: who's responsible? in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe,* (Cambridge: CUP, 2012), pp. 167-181.

[107] UN Guidelines for Consumer Protection, section J (e), 2016.

remuneration of their staff. If a conflict exists, nevertheless, this should be disclosed to the consumer.[108]

While the EU Consumer Credit Directive does not address the problem of conflict of interest, the more recent Mortgage Credit Directive (MCD) has included a section on remuneration of staff aimed to avoid conflict of interest. Regrettably, though, the MCD does not expressly mention that conflict of interest should be disclosed to the consumers. Closing this gap seems essential to the construction of a robust consumer protection framework.[109]

6.2. Clear contract terms

Clear information on credit options and comprehensibility of contract terms are important to promote the consumer's substantive autonomy. In this regard, the UN Guidelines state that "clear, concise and easy to understand contract terms that are not unfair" should be encouraged.[110] In addition, according to the G20 High Level Principles, banks should train their sales staff sufficiently to provide clear and accurate information and credit advice to consumers.

As mentioned in the previous regulatory section of this article,[111] the main strategy pursued by the EU in this area is to require financial services entities to provide consumers with detailed information. However, financial contracts can still be difficult to understand and the EU Consumer Market Scoreboard[112] has indicated deficiencies in the provision of pre-contractual information. These are particularly detrimental when the products involved are complex, as in the case of certain forms of credit, and when consumers may be subject to irrational biases and misperceptions, as behavioural economics has demonstrated.[113]

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[108] See Annex 2 of the OECD Good Practices on Financial Education and Awareness Relating to Credit, 2009, p. 16 et seq.

[109] See e.g. R. Inderst and M. Ottaviani, How (not) to pay for advice: A Framework for consumer financial protection, Journal of Financial Economics, 105 (2012) 292-411

[110] UN Guidelines for Consumer Protection, section J.

[111] See sections 3 and 4 of this article.

[112] Consumer Markets Scoreboard: Monitoring consumer outcomes in the Single Market, 1st editions and 2nd edition 2009; see also the Commission Staff Working Document on the Follow up in Retail Financial Services to the Consumer Markets Scoreboard, Brussels, 22.9.2009.

[113] See e.g. A. Lefevre, and M. Chapman (2017), "Behavioural economics and financial consumer protection", OECD Working Papers on Finance, Insurance and Private Pensions, No. 42, OECD Publishing, Paris; UN Manual on Consumer Protection, Advance Copy 2016; see also J. Stiglitz, Chair United Nations Commission of

Therefore, it seems necessary that an effective consumer protection system, which also maintains a substantial party autonomy, defines a role for the seller to actively advise consumers on particular aspects of complex products, and on the consequences these may have in the longer term.[114] More emphasis should be placed on fair treatment, ensuring that consumers have fully understood the different credit products and the risks involved, so they can identify the most suitable product. Furthermore, in order to discourage the availability of over complex products key standard credit contracts could be developed which provide an adequate level of consumer protection.[115]

6.3. Independent advice

Ensuring the availability of independent advice and thus unbiased information by third parties is essential to enable consumers to make autonomous and well informed decisions. According to the World Bank's Good Practices for Financial Consumer Protection, consumer associations and regulators should play a key role in offering unbiased information on basic features, risks and benefits of the different banking products.[116]

Objective and reliable sources of information would help consumers to better understand different financial services and they would feel more confident in choosing a suitable product for their specific circumstances. Consequently, public authorities should facilitate the work of non-governmental organisations whose mission is to improve consumer awareness on financial products and to provide independent advice.

The current EU Credit and Mortgage Credit Directives do not contain any provisions along these lines. This, therefore, is another avenue for future development of the EU financial consumer protection system.

Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System, Recommendations 63 Session Agenda Items 48 United Nations, para 40, 2009.

[114] Commission Staff Working Document on the Follow up in Retail Financial Services to the Consumer Markets Scoreboard, Brussels, 22.9.2009.

[115] See for example the suggestions by: Consumer International, safe, fair and competitive markets in financial services: recommendations for the G20 on the enhancement of consumer protection in financial services, Executive Summary, March 2011, p. 2.

[116] The World Bank, Good Practices for Financial Consumer Protection, Washington, June 2012, p. 30.

6.4. Financial education and inclusion

A study conducted by the OECD after the financial crisis shows that financial literacy can contribute considerably to financial market stability.[117] As financial markets have become more complex, consumers struggle to assess different credit options and the risks involved. They often lack the understanding of financial products and overestimate their knowledge leading to unsuitable decisions, in particular for vulnerable consumers. Thus, financial education policies can help consumers to evaluate different products and make an adequate choice.

At the national level, financial education objectives have inspired an increasing number of countries, including the US and Canada. As a result, new initiatives were adopted, aimed at creating better informed and responsible financial services users.[118] Despite its merits, this approach may still find inescapable limits. As argued by Williams and by behavioural scholars, under certain circumstances such as volatile and complex markets, individuals may be *inherently* unable to make rational decisions, and thus remain vulnerable to manipulation.[119] However, it is clear that such biases are reduced as the level of education is raised, leaving room for the EU and national governments to promote financial education policies which, ideally, should both keep abreast of the evolution in financial products, and be mindful of the deeply-rooted limitations in human decision-making.

While the Mortgage Credit Directive in the EU contains a provision for the financial education of consumers in relation to responsible borrowing and debt management,[120] the Consumer Credit Directive only briefly mentions education in the preliminary remarks. Both Directives could go further by proposing more detailed guidelines on financial education and inclusion. The OECD is again leading the way in this area, providing recommendations of good practices

[117] OECD, Financial Literacy and Consumer Protection: Overlooked Aspects of the Crisis, OECD Recommendation on Good Practices on Financial Education and Awareness Relating to Credit, 2009, p. 16 et seq.

[118] See T. Williams, Empowerment of Whom and for What: Financial Literacy Education and the New Regulation of Consumer Financial Services, 29 Law & Policy 226 (2007).

[119] Williams argues that the consumer education should not be used as a policy tool to shift responsibility away from the state and companies to the consumers: T. Williams, Empowerment of Whom and for What: Financial Literacy Education and the New Regulation of Consumer Financial Services, 29 Law & Policy 226 (2007); Y. Gabriel and T. Lang, The Unmanageable Consumer: Contemporary Consumption and its Fragmentations: Sage Publications (1995).

[120] Article 6 of the Mortgage Credit Directive: "Member States shall promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. Clear and general information on the credit granting process is necessary in order to guide consumers, especially those who take out mortgage credit for the first time. Information regarding the guidance that consumer organisations and national authorities may provide to consumers, is also necessary."

to enhance financial education and awareness of credit. For example it suggests that governments should promote financial literacy by adopting coherent education programmes targeting schools and adults alike.[121] As instruments for these programmes, the OECD mentions among others advertisements, publications, and comparison websites or telephone hotlines to provide reliable, independent information. The financial education programme should aim, at the very least, at:

- developing consumers' understanding of their rights and responsibilities;
- developing a good knowledge of the available credit options, along with their consequences;
- helping consumers find relevant information, plan their finances and make responsible decisions;
- helping consumers understand the risks and the effects of credit choices.[122]

In particular, vulnerable consumers should be offered advice on how to access credit and manage finances responsibly.[123] Echoing the World Bank's Good Practices for Financial Consumer Protection discussed above, the OECD also identified a role for consumer groups in educating consumers. They could, for instance, offer reading material or training sessions on financial matters, and direct consumers towards sources of relevant information.

6.5. Foreclosure procedures and responsible lending

In the previous discussion of recent case law, we have argued that fairness should be key in enforcement and foreclosure procedures in financial services. This is because of the serious consequences of the latter on the lives of affected consumers which, as shown by the recent crisis, may even introduce elements of instability in the financial system.[124]

The Mortgage Credit Directive (MCD) deals with the issue of foreclosure procedures very briefly in Article 28, mentioning the "significant consequences for creditors, consumers and

[121] See Annex 2 of the OECD Good Practices on Financial Education and Awareness Relating to Credit, 2009, pp. 13 et seq.

[122] See Annex 2 of the OECD Good Practices on Financial Education and Awareness Relating to Credit, 2009, p. 16 et seq.

[123] Annex 2 of the OECD Good Practices on Financial Education and Awareness Relating to Credit, 2009, p. 16 et seq.

[124] See Commission Staff Working Document on the Follow up in Retail Financial Services to the Consumer Markets Scoreboard, Brussels, 22.9.2009.

potentially financial stability". As a consequence, in 2015, Guidelines were developed by the European Banking Authority (EBA), providing guidance on how the MCD foreclosure provisions should be implemented in the Member States, covering additional issues like interaction with consumers, information and resolution processes. At an even higher level, the World Bank suggests best practices to ensure fair bankruptcy procedures for consumers and to avoid abusive debt collection practices.[125]

These Guidelines are useful because they provide a minimum protection level for consumers, to be respected by the creditor. Importantly, the creditor has to establish early procedures to detect consumers going into payment difficulties and engage with them to assess the problems, providing them with information on the consequences of persistent payment difficulties.[126] However, the Guidelines could go further, in particular in relation to vulnerable consumers. For example, following the regulations of some Member States, they could recommend special provisions for consumers affected by important life events, such as unemployment or illness, and set a higher bar in terms of clarity and thoroughness of information due to the individual.[127] Furthermore, the involvement by debt assistance entities to provide early advice, and the right of the debtors to be assisted by consumer organisations or lawyers in meetings with the creditor, can help them to carefully assess the different options available to resolve the situation.[128]

EBA's foreclosure guideline 4 is essential in this regard stating that "the creditor should take into account the individual circumstances of the consumer, the consumer's interests and rights and his/her ability to repay when deciding on which steps/forbearance measure to take". These 'measures' may include extensions of mortgages terms, changes in mortgage type, deferred payment options or changes to the interest rate.

While innovative, the Guidelines and the Directive stop short of establishing two crucial measures: providing guarantees to the consumers in case of a settlement procedure,[129] and imposing penalties on financial services providers if they don't comply with the key principle

[125] The World Bank, Good Practices for Financial Consumer Protection, Washington, June 2012, pp. 23-24.

126 Guidelines 1 and 2.

127 For an overview of national measures see European Commission's Staff Working Paper, National measures and practices to avoid foreclosure procedures for residential mortgage loans, Accompanying document to the Proposal for a Directive on credit agreements relating to residential property, Brussels, 31.3.2011, SEC(2011) *357 final*.

[128] See also BEUC response on EBA Consultation on the Draft Guidelines on arrears and foreclosure under the Mortgage Credit Directive, 2015.

[129] For example a prohibition from terminating credit agreements early.

of responsible lending.[130] For example, it would seem reasonable that the consumer could be partly or fully relieved from the debt, depending on the circumstances, if the creditor did not perform a careful creditworthiness assessment, or if it provided the consumer with misleading information or advice.

Finally, it would be conceivable and desirable that the EU policy framework fostered the development of debt assistance entities, which could provide early assistance to distressed borrowers, and help them 'start afresh' after a foreclosure process.[131]

6.6. Managing over-indebtedness

Recent statistical data has shown a marked increase in household borrowing in many EU Member States, to the point where indebtedness now represents a key challenge.[132] Similarly, a recent market study by the UK Financial Conduct Authority (FCA) revealed that credit card debt in the United Kingdom has grown constantly over the last decade, and that a considerable group of consumers have persistent credit card debts.[133] Financial services providers have little incentive to address this problem, because these consumers are often profitable, typically paying high interest rates and charges.[134] Therefore, the FCA has proposed new rules to tackle long-term credit card debts, such as requiring credit providers to identify distressed consumers in time, and envisaging the possibility of reducing charges and interest rates for these consumers.[135]

This again highlights the importance of determining a fair balance between providing credit to consumers and avoiding unsustainable lending practices. Responsible lending provisions have

[130] See the Final EBA Report on Guidelines on Arrears and Foreclosure, EBA/GL/2015/12, 1 June 2015, p. 38; see also BEUC Response to EBA Consultation Draft Guidelines on arrears and foreclosure under the Mortgage Credit Directive– X-2015 – 12/02/2015, p. 6.

[131] See for example I. Benöhr, Consumer Protection and Human Rights (OUP: Oxford, 2014).

[132] See the European Commission Staff Working Document on the Follow up in Retail Financial Services to the Consumer Markets Scoreboard, Brussels, 22.9.2009, pp. 26 et seq.

[133] See the FCA credit card market study: https://www.fca.org.uk/publications/market-studies/credit-card-market-study, 2014; see also the FCA consultation paper: https://www.fca.org.uk/publication/consultation/cp17-10.pdf (last visited: 20 Sept. 2017).

[134] https://www.ft.com/content/f6992568-4149-11e7-9d56-25f963e998b2, (last visited on 24 August 2017); see also the FCA credit card market study: https://www.fca.org.uk/publications/market-studies/credit-card-market-study, 2014 (last visited: 20 Sept. 2017).

[135] Consultation https://www.fca.org.uk/publication/consultation/cp17-10.pdf (last visited: 20 Sept. 2017).

already been included in both Consumer Credit Directives discussed previously, but these don't provide for particular penalties in case of non-compliance, which makes them less effective.

6.7. Effective dispute resolution mechanisms

Recent research has shown that effective and fair dispute resolution mechanisms are in the interests of both providers and consumers.[136] Moreover, in the financial sector in particular it is important that these mechanisms be independent and binding on the provider.[137] The EU Credit Directive and the Mortgage Credit Directive already contain short provisions on out of court dispute resolution but they are still relatively soft, failing to make these mechanisms sufficiently binding. An arguably successful redress scheme is provided by the United Kingdom's Financial Ombudsman Service (FOS),[138] which is an independent body that decides on disputes between consumers and financial firms quickly and with minimum formality. Its decisions are binding on the financial services provider, offering consumers a reliable and free redress mechanism for financial disputes.

In addition, a recent EU study[139] has shown that the finance sector is characterized by diffuse interests which is likely to generate a high number of collective redress cases. However, the EU legal framework in this area is still patchy and, as a result, financial consumers often struggle to obtain satisfactory redress in collective redress claims. A way to close this gap is signposted by the World Bank Best Practices for Financial Consumer Protection and by the UN Guidelines for Consumer Protection. These envisage a variety of dispute resolution instruments, including in-house complaints procedures, formal dispute settlement mechanisms, and collective redress procedures.[140] Finally, compulsory publication of complaints data would

[136] C. Hodges, I. Benöhr, N. Creutzfeld Banda, Consumer ADR in Europe, Hart Publishing, 2012.

[137] Civic Consulting, DG SANCO Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, 2008, p. 39; Civic Consulting, DG SANCO Study on the use of Alternative Dispute Resolution in the European Union, 2009.

[138] The Financial Services and Markets Act 2000 can be found on the HM Treasury website http://www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_1 (last visited: 20 Sept. 2017).

[139] Civic Consulting, DG SANCO Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, 2008, p. 39.

[140] The World Bank, Good Practices for Financial Consumer Protection, June 2012, pp. 26 et seq.; UN Guidelines for Consumer Protection, F sections 37 to 41, 2016.

help regulators and consumers compare and assess the performance of financial services providers.

7. Conclusion

When the economic and financial crisis erupted in 2008, thousands of homeowners found their homes at risk of repossession with a profound effect on society and welfare. This brought to the fore the social and economic dimension of consumer law, especially with respect to credit agreements. In the EU, consumer law has traditionally played an important role in enhancing the internal market integration. By discussing recent developments this article demonstrates that the focus of financial consumer protection has changed. Financial consumer law is gradually becoming a leading area of innovation on the EU legal landscape, involving discussions around transparency, good business conduct, fundamental rights and basic legal principles.

The article therefore traced the historical evolution that started with the pre-crisis EU financial services regulatory framework. Focusing on the information technique to protect consumers, this was very narrow, in particular with regard to consumer credit contracts. This reflected the significant weight granted to the private autonomy principle in accordance with a liberal approach concerned more with preserving formal liberties than with protecting vulnerable individuals.[141]

The Mortgage Credit Directive marked a change in paradigm. Influenced by the OECD principles of financial consumer protection, it focuses on financial literacy and on business ethics. However, the Directive is still limited in relation to fairness provisions, foreclosure procedures, and the protection of vulnerable consumers.

In contrast, the recent CJEU case law seems to indicate a new direction, increasingly protecting the consumer as the weaker and vulnerable party, and thus reinforcing consumer protection at the national level. The Court has in particular become active in the interpretation of unfair terms, pushing for an interpretation of national procedural law that favours consumers, offering effective protection and guaranteeing due process. The Charter of Fundamental Rights plays

[141] See C. Garcia Porras and W. van Boom, "Information disclosure in the EU Consumer Credit Directive: opportunities and limitations" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 21-55; see also O. Cherednychenko, "Fundamental Rights, European Private Law, and Financial Services" in H. Micklitz, *Constitutionalization of European Private Law,* (Oxford: OUP, 2014) 193-195.

an increasingly important role in the CJEU's analysis, as an inspiration to strengthen the protection of the weaker party in consumer credit contracts.[142] Hence, while the Unfair Terms Directive 93/13 was ultimately created to enhance market integration, the CJEU shifted the focus to the consumer,[143] leveraging the principle of the protection of the weaker party, as opposed to that of autonomy.

However, the Court only provides a limited solution to the broader challenges in financial consumer protection. This article argued that these can only be addressed by a comprehensive legislative framework which needs to strike a delicate balance between private autonomy and protection of the weaker party, and steer regulation through a number of challenges: objective difficulties for consumers in making complex decisions, conflicting incentives of financial services providers, unreliability of information, the need to preserve fairness and the pursuit of social objectives.[144] Inspired by international guidelines and best practices, this article has suggested a possible way forward to accomplish these difficult tasks at the European and national level.

[142] H. Micklitz and N. Reich, "The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive" (2014) *Common Market Law Review* 51, 771-808; O. Gerstenberg, "Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts" (2015) *European Law Journal,* vol. 21, no. 5, 614-616.

[143] Di Nero, "The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sanchez Morcillo* and *Kušionová*" (2015) *Common Market Law Review* 52, 1031.

[144] See e.g. S. Nield, "Mortgage finance: who's responsible?" in J. Devenney, M. Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge: CUP, 2012), 167-181; see e.g. R. Inderst and M. Ottaviani, "How (not) to pay for advice: A Framework for consumer financial protection" (2012) *Journal of Financial Economics,* 105, 292-411.